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No. 85-517 (2)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

MILTON A. MILLER and
MANDEL M. MILLER,

Petitioners,

vs.

CITY OF LOS ANGELES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Should this Court review a decision of the Court of Appeals which held tnat Fair Assessment In Real Estate v. Mc Nary (1981) 454 U.S. 100 bars the petitioners action brought under 42 U.S.C. § 1983 challenging the levy of an assessment against their real property by a special assessment district where there are sufficient state remedies?

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Respondent City of Los Angeles respectfully opposes the Petition for Writ of Certiorari ("Petition") filed herein.

STATEMENT OF THE CASE

A. Factual Background

This is an action brougnt under 42 U.S.C. § 1983 by Milton A. Miller and Mandel M. Miller ("petitioners") challenging the inclusion of their property in an assessment district. The assessment district challenged by the petitioners was established to improve the street on which their property fronts. Appellate Record (hereafter "AR") 1. The petitioners property will be charged an amount commensurate with its benefit from the street improvements pursuant to the Improvement Act of 1911 (California

Streets and Highways Code § 5000 et seq.). The street improvements require the acquisition of the front 20 feet of tne petitioners property for which a condemnation action has been filed (AR 2, Exnibit A).

B. Proceedings Below

On January 5, 1983 petitioners filed a complaint in District Court seeking damages under 42 U.S.C. § 1983 (AR 1). The essence of the petitioners' claim is set forth at page 7 of their complaint wherein they state that the proposed street improvements should be constructed at "City expense" because the petitioners

property will not benefit from the project (AR 1 at 7).

The City filed a Motion to Dismiss the petitioners Complaint on tne ground tnat Fair Assessment in Real Estate v. Mc Nary, supra, barred the petitioners action (AR 2).

The City's motion was argued and the District Court on March 14, 1983 issued a "Memorandum Decision and Order of Dismissal" (AR 9). The petitioners sougnt reconsideration of the District Courts March 14, 1983 decision and on May 11, 1983 the District Court denied the petitioners motion to reconsider and amended its previous "Memorandum Decision and

Order of Dismissal" to show that the Court considered the adequacy of remedies available under the laws of the State of California and found that "those remedies are plain, adequate and complete" (AR 16).

The petitioners appealed the District Courts dismissal to the United States Court of Appeals for the Ninth Circuit which issued its decision on March 22, 1985. The decision is reported at 755 F.2d 1390. On June 25, 1985 the petitioners requests for rehearing and suggestion for rehearing en banc were denied. This petition follows.

SUMMARY OF ARGUMENT

The Improvement Act of 1911 (California Streets and Highway Code § 5000 et seq.) is a widely used procedure in California to fund the construction of a variety of public improvements. The Court of Appeals correctly recognized that to permit taxpayers to challenge assessments made pursuant to this act in federal court would constitute a substantial intrusion into the state taxing function and would therefore violate the principals of comity stated by this Court in Fair Assessment. Further, the Court of Appeals also

correctly held that the petitioners have adequate remedies available to them under the laws of the State of California which preclude them from seeking review of their special assessment in federal court.

ARGUMENT FOR DENIAL OF THE PETITION

THE COURT OF APPEALS' DECISION IS FULLY CONSISTENT WITH APPLICABLE PRECEDENT OF THIS COURT, AND THUS NO GROUNDS EXIST FOR THIS COURT'S REVIEW

This Court held in Fair Assessment In Real Estate v. Mc Nary, supra, 454 U.S. at 116 that:

> ". . . taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts. Such taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete, and may ultimately seek review of the state decisions in this Court."

Petitioners attempt to avoid the holding of Fair Assessment by arguing in their petition that the 1911 Act is not the kind of tax with which the comity concept is concerned (Petition at 16) and that the state remedies are not plain, adequate and complete (Petition at 9 and 18). Each of these issues will be discussed below.

A. The Mc Nary Principle Of Comity Applies To This Form of Taxation

Justice Brennan in his concurring and dissenting opinion in Perez v. Ledesma (1971) 401 U.S. 82, 128, fn 17, which was cited in Fair Assessment, 454 U.S. at 108, fn 6, sets forth the reasons for federal court deference to state tax administration:

> "The special reasons justifying the policy of federal noninterference with state tax collection are obvious. The procedures for mass assessment and collection of state taxes and

for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory relief were available to test state tax assessments, state tax administrtion might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, wnich, like issues of state regulatory law, are more properly heard in the state courts."

The policies set forth by Justice Brennan apply with equal force to this significant element of the California tax system. A California Court of Appeal described the importance of the system as a revenue raising device in the following manner:

> "For over 60 years [the Improvement Act of 1911 and the Municipal Improvements Act of 1913] have provided the most widely used procedure in California for the construction of a variety of public improvements including streets, sewers, sidewalks, water systems, lighting and public utility lines; property owners benefitted by the improvements pay for these improvements either in cash or, at their option, by

> installments over a period of time. (citation) Amicus curiae City of Los Angeles states that within its jurisdiction alone almost $15.5 million in streets, sewers, drains and incidental facilities were constructed in the three and one-half years ending December 31, 1978; almost half of the funding for these projects was paid by assessment procedures under these acts, with much of the remainder paid by federal grants as 'matching funds.' Los Angeles also states it has similar projects pending with estimated construction costs of over $52 million. (County of Fresno v. Malmstrom (1979) 94 Cal.App.3d 974, 978.)

Petitioners cite the County of Fresno case in their petition at 17, to support their contention that a special assessment is not a tax; however, it must be noted that the

issue before the California Court involved a question of statutory construction, whether or not certain provisions of the California Tax Limitation Initiative applied to the issuance of bonds pursuant to the Improvement Act of 1911, not whether the assessment procedure was a component of the state tax system.

Assessments made pursuant to the Improvement Act of 1911 are a critical element of the California tax system and, as the District Court noted in its "Memorandum Decision and Order of Dismissal":

> "this method of providing for highway improvements is truly

> a 'tax system' in that it is inextricably interwined with the fiscal policies of the state, and the administration of the improvement program." (AR 9 at 5)

The Court of Appeals further observed:

> "The power to create special assessment districts to pay the cost of street improvements is a legislative process grounded in the taxing power of the soverign." Miller v. City (9th Cir 1985) 755 F.2d 1390, 1391.

The Court of Appeals decision is therefore consistent with this Courts precedent in holding that "[t]he Mc Nary principal of comity, therefore, applies to this peculiarly local and state form of taxation." 755 F.2d at 1391.

B. The Petitioners Have Adequate State Remedies

Fair Assessment required tnat the remedies available to a taxpayer are "plain, adequate and complete" before the taxpayers action could be barred by the principals of comity (454 U.S. at 116). This Court has noted that the phrase "plain, adequate and complete" is virtually synonymous with the phrase "plain, speedy and efficient" used in the Tax Injunction Act (28 U.S.C. § 1341) (Fair Assessment, 454 U.S. at 116 fn 8). The meaning of "plain, speedy and efficient" was discussed by this Court

in Rosewell v. LaSalle National Bank (1981) 450 U.S. 503. Initially it was noted that "[o]n its face the 'plain, speedy and efficient remedy' appears to require a state-court remedy that meets certain minimal procedural criteria" (450 U.S. at 512, emphasis by the Court). This Court further noted in Rosewell that based upon the legislative history of the Tax Injunction Act, the minimal procedural criteria are met by a "full hearing and judicial determination of the Controversy" 450 U.S. at 514.

This Court has also noted in California v. Grace Brethren Church (1982) 457 U.S. 393 at 413 that it

"must construe narrowly the 'plain, speedy and efficient' exception to the Tax Injunction Act".

A "full hearing and judicial determination of the controversy" is clearly available to the petitioner. California courts will provide the "full hearing and judicial determination" to the petitioner. California courts are not reluctant to review the issues raised by the petitioner. The California Supreme Court held seventy years ago that an assessment scheme very similar to that alledged by the petitioners was not valid because the project did not confer a benefit on the assessed

property. (Spring Street Company v. City of Los Angeles, (1915) 170 Cal. 24 at 30.) The California Courts have continued to review assessment districts as is apparent from the cases cited by petitioner (Petition at 19 and 20), and the Court of Appeals (755 F.2d at 1391).

Additionally, California State Courts allow actions to vindicate federal rights under Section 1983 (Williams v. Horvath (1976) 16 Cal.3d 834) just as the Missouri Supreme Court did in Fair Assessment (454 U.S. at 116). Although, the petitioners have apparently argued that comity should not bar a Section 1983 action

(Petition at 9), Fair Assessment disposed of that issue contrary to the petitioners contentions when a Section 1983 action challenges the administration of state tax laws (454 U.S. at 105). The petitioners also had non-judicial remedies available to them before seeking judicial relief as the Court of Appeals properly noted in its decision (755 F.2d at 1391).

Accordingly, as the Court of Appeals properly held, "[t]he state remedies available to the Millers preclude them from seeking review of their special assessment in federal court". 755 F.2d at 1391.

CONCLUSION

Since the courts below properly applied applicable precedent, there is no ground under Rule 17 of the Rules of the Supreme Court to grant the Petition for Writ of Certiorari and accordingly the petition should be denied.

Respectfully submitted,

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